

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

LINKSTON LIONS,

Petitioner,

vs.

RENEE BAKER, et al.,

Respondents.

3:13-cv-00321-RCJ-WGC

ORDER

This *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is before the court on respondents' motion to dismiss (ECF #19). Petitioner opposed the motion (ECF #25), and respondents replied (ECF #26).

I. Procedural History and Background

A jury found petitioner guilty of robbery with the use of a deadly weapon, grand larceny auto, battery with the use of a deadly weapon, and battery by strangulation (exhibit 35 to motion to dismiss).¹ At sentencing, the State struck the conviction for battery by strangulation. Exh. 42 at 4. The state district court sentenced petitioner as follows: count 2 - robbery with the use of a deadly weapon - 48 to 120 months, with a consecutive 48 to 120 months for the deadly weapon enhancement; count 3 - grand larceny auto - 24 to 60 months to run concurrent to count 2; count 4 - battery with the use of a deadly weapon - 12 to 120 months consecutive to count 2. *Id.* at 8. Judgment of conviction was entered on February 23, 2011. Exh. 43.

¹ All exhibits referenced in this order are exhibits to respondents' motion to dismiss (ECF #19) and may be found at ECF #s 20-23.

1 Petitioner appealed, and the Nevada Supreme Court affirmed his convictions on November 18,
2 2011. Exh. 59. Remittitur issued on December 15, 2011. Exh. 61.

3 Petitioner filed a *pro se* postconviction habeas corpus petition and a motion for appointment of
4 counsel with the state district court. Exhs. 68, 70. The state district court denied the petition, the
5 Nevada Supreme Court affirmed the denial of the petition on April 10, 2013, and remittitur issued on
6 May 9, 2013. Exhs. 74, 82, 84.

7 Petitioner dispatched his federal habeas petition on June 11, 2013 (ECF #10). Respondents now
8 move to partially dismiss the petition on the basis that several grounds are procedurally barred and/or
9 not cognizable in federal habeas proceedings (ECF #19, pp. 5-7).

10 **II. Legal Standards & Analysis**

11 **A. Procedural Bar**

12 “Procedural default” refers to the situation where a petitioner in fact presented a claim to the
13 state courts but the state courts disposed of the claim on procedural grounds, instead of on the merits.
14 A federal court will not review a claim for habeas corpus relief if the decision of the state court
15 regarding that claim rested on a state law ground that is independent of the federal question and
16 adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).

17 The *Coleman* Court stated the effect of a procedural default, as follows:

18 In all cases in which a state prisoner has defaulted his federal claims in
19 state court pursuant to an independent and adequate state procedural rule,
20 federal habeas review of the claims is barred unless the prisoner can
21 demonstrate cause for the default and actual prejudice as a result of the
22 alleged violation of federal law, or demonstrate that failure to consider
23 the claims will result in a fundamental miscarriage of justice.

24 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). The procedural
25 default doctrine ensures that the state’s interest in correcting its own mistakes is respected in all federal
26 habeas cases. *See Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003).

27 To demonstrate cause for a procedural default, the petitioner must be able to “show that some
28 *objective factor external to the defense* impeded” his efforts to comply with the state procedural rule.
Murray, 477 U.S. at 488 (emphasis added). For cause to exist, the external impediment must have
prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

1 Respondents argue that grounds 4, 5, 6, 7 and 9 are procedurally defaulted.

2 In ground 4, petitioner alleges that Nevada's robbery statute is void for vagueness and thus its
3 application to him violates his Fifth and Fourteenth Amendment due process rights (ECF #10, pp. 31-
4 34). In ground 5, petitioner claims that NRS 193.165 is silent and ambiguous as to how it is to be
5 applied and violates his Fifth Amendment protection from self-incrimination and his Fifth and
6 Fourteenth Amendment due process rights. *Id.* at 36-46. In ground 6, petitioner claims that the Nevada
7 statutes he was arrested under do not "contain the required enacting clause," and therefore, his federal
8 and state constitutional rights were violated. *Id.* at 47-54. Petitioner argues in ground 7 that the state
9 district court erred in admitting evidence that he attempted to use stolen credit cards without first
10 conducting a hearing to consider the admissibility of the evidence and to consider a limiting instruction
11 to the jury regarding consideration of that evidence. *Id.* at 56-58. And in ground 9, petitioner argues
12 that juror misconduct—one juror witnessed another juror talking on her cellphone about the trial during
13 a recess—violated his Fourteenth Amendment due process rights. *Id.* at 62-63.

14 Respondents point out that petitioner raised these five claims for the first time in his state
15 postconviction petition and that the Nevada Supreme Court clearly and expressly invoked NRS 34.810
16 to affirm the denial of the claims because they were reasonably available to be raised on direct appeal
17 and petitioner failed to demonstrate good cause for his failure to do so (ECF #19, p. 5; Exh. 70, Exh.
18 82 at 8). Respondents contend that this state-law ground is an independent and adequate state law basis
19 that bars these claims from review in this federal habeas proceeding (ECF #19, p. 5).

20 Under Nevada law, the court shall dismiss a state postconviction petition if petitioner was
21 convicted pursuant to a jury trial and the claim could have been raised in a direct appeal. Petitioner
22 bears the burden of proving good cause for his failure to present the claim and of proving actual
23 prejudice. NRS 34.810(1)(b)(2). Here, the Nevada Supreme Court explicitly relied on this procedural
24 bar when it declined to review the state habeas petition claims that correspond to grounds 4, 5, 6, 7,
25 and 9 of the federal habeas petition. Exh. 82 at 8. The Ninth Circuit Court of Appeals has held that,
26 at least in non-capital cases, application of the procedural bar at issue in this case – NRS 34.810 – is
27 an independent and adequate state ground. *Vang v. Nevada*, 329 F.3d 1069, 1073-75 (9th Cir. 2003);
28 *see also Bargas v. Burns*, 179 F.3d 1207, 1210-12 (9th Cir. 1999).

1 In opposing the motion to dismiss, petitioner acknowledges that grounds 7 and 9 are
 2 procedurally defaulted (ECF #25, p. 3). He urges that if grounds 4, 5, and 6 are procedurally defaulted,
 3 this court should nevertheless consider these claims as plain error. *Id.* at 2. However, this argument
 4 is unavailing. This court is barred from reviewing these claims unless petitioner demonstrates cause
 5 for the default and actual prejudice as a result of the alleged violation of federal law, or that failure to
 6 consider the claims will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.
 7 Petitioner makes no argument regarding cause and prejudice. Grounds 4, 5, and 6 challenge Nevada
 8 robbery and deadly weapon sentence enhancement statutes as unconstitutionally vague, ambiguous
 9 and/or lacking a requisite enacting clause (ECF # 10, pp. 31-54). To the extent that petitioner's plain
 10 error argument could be viewed as an argument that not considering these claims on their merits will
 11 result in a fundamental miscarriage of justice (ECF #25, p. 3), this court agrees with respondents that
 12 petitioner has not presented any allegations to show that new and reliable evidence demonstrates that
 13 no reasonable juror could have found petitioner guilty beyond a reasonable doubt (ECF #26, p. 2, citing
 14 *Schlup v. Delo*, 513 U.S. 298, 326-329 (1995) (acknowledging that the fundamental miscarriage of
 15 justice standard is based on factual innocence)).

16 Accordingly, this court finds that the Nevada Supreme Court's holding that the claims raised
 17 here as federal grounds 4, 5, 6, 7, and 9 were procedurally barred under NRS 34.810(1)(b)(2) was an
 18 independent and adequate ground for the court's dismissal of those grounds in the state postconviction
 19 petition. Thus, the court grants respondents' motion to dismiss grounds 4, 5, 6, 7, and 9 as procedurally
 20 barred.

21 **B. Federally Cognizable Claims**

22 Alleged errors in the interpretation or application of state law do not warrant habeas relief.
 23 *Hubbart v. Knapp*, 379 F.3d 773, 779–80 (9th Cir.2004). "Federal habeas corpus relief does not lie for
 24 errors of state law . . . it is not the province of a federal habeas court to reexamine state court
 25 determinations of state law." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (quotations and internal
 26 citation omitted).

27 In federal ground 10, petitioner claims that the state district court erred in admitting evidence
 28 of his prior bad acts without conducting a hearing pursuant to *Petrocelli v. State*, 692 P.2d 503 (Nev.

1 1985) or giving a limiting instruction pursuant to *Tavares v. State*, 30 P.3d 1128 (Nev. 2001) in
2 violation of his Fourteenth Amendment due process rights (ECF #10, pp. 65-66). Respondents contend
3 that, to the extent that this ground asserts error under the two Nevada state cases, it is noncognizable
4 in federal habeas proceedings.

5 Respondents' argument that a portion of ground 10 is subject to dismissal is meritless. They
6 concede that a claim that the state court erred in admitting evidence of other bad acts—if the admission
7 of the evidence so infected the trial with unfairness as to render the verdict a denial of due process—is
8 a federally cognizable claim. The gravamen of ground 10 is clearly a federal constitutional claim and
9 no separate state-law claim should be parsed out here. Accordingly, respondents' motion to dismiss
10 is denied as to ground 10.

11 **III. Conclusion**

12 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (ECF #19) is
13 **GRANTED** in part as follows: grounds 4, 5, 6, 7, and 9 are **DISMISSED** as **PROCEDURALLY**
14 **BARRED**.

15 **IT IS FURTHER ORDERED** that respondents' motion to dismiss (ECF #19) is **DENIED** as
16 to ground 10.

17 **IT IS FURTHER ORDERED** that petitioner's motion for status check (ECF #27) is **DENIED**
18 as moot.

19 **IT IS FURTHER ORDERED** that respondents shall have **forty-five (45) days** from the date
20 of this order to file an answer to petitioner's remaining grounds for relief. The answer shall contain all
21 substantive and procedural arguments as to all surviving grounds of the petition, and shall comply with
22 Rule 5 of the Rules Governing Proceedings in the United States District Courts under 28 U.S.C. §2254.

23 **IT IS FURTHER ORDERED** that petitioner shall have **thirty (30) days** following service of
24 respondents' answer in which to file a reply.

25
26 Dated this 25th day of August, 2015.

27
28 
UNITED STATES DISTRICT JUDGE